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Supreme Court, U.S.
FILED
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In The

SUPREM COURT of the UNITED STATES

Raymond Bischoff — Petitioner

V.

Commonwealth of Kentucky, — Respondents
Louisville and Jefferson County Sewer District,
Zielke, Pedley, Gordinier, Dwyer, Clayton

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth District

PETITION FOR WRIT OF CERTIORARI

Raymond Bischoff
5215 Bardstown Road
Louisville, Kentucky 40291
(502) 499-1323

QUESTIONS PRESENTED

1. Without Written Release from the property owner, then, how can the filed for, state granted and held Bench Trial, for a compensation matter of property over twenty dollars, be considered anything but irrefutable proof of violating a citizen's guaranteed right to Just Compensation and Jury Trial under U.S. Constitution Amendments V and VII ?

2. How can Just Compensation be satisfied, when agricultural products are taken or destroyed without recognition or compensation from the defendants, and fair market value is outrageously unjust and arbitrary under a bench trial ?

3. How can the Commonwealth of Kentucky Eminent Domain law be considered constitutional when it has no gatekeepers to guard against abusive use and no allowance for total loss of fair market value for property, as in Luca v. South Carolina Coastal Council, 505 U.SS. 1003 (1992) ?

4. Is Judicial Immunity the Scapegoat by which the Respondents, in their official capacities, justify failure to uphold the true essence of the laws and rights of citizens, putting the burden of time and expense upon the citizen to seek justice ?

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ORIGINAL COMPLAINT

JURISDICTION

Jurisdiction in this claim relies upon the U.S. Constitution Amendment V and VII to uphold the guaranteed rights of a citizen for Just Compensation and Jury Trial for a matter of property over twenty dollars. The citizen can not rely upon the defendants, all, when, in a matter of compensation, a bench trial was filed for and then held, without Written Release from this citizen Just Compensation can not be satisfied by a forced bench trial of an outrageously unjust and arbitrary decree, and destroyed or taken agricultural crops have not been recognized for compensation.

Commonwealth of Kentucky Eminent Domain law does not have a gatekeeper for abuse and no allowance for total loss of fair market value, therefore, 28 U.S.C. 2403(b) may apply and shall be served on its Attorney General.

The Order entered October 22, 2007, by the United States Court of Appeals, For the Sixth Circuit does not uphold the rights of this citizen's claim.

The Opinion and Order entered January 26, 2007, by the United States District Court, Western District of Kentucky at Louisville, does not uphold the rights of this citizen's claim.

Extension of time January 30, 2008, extended to February 19. 2008.

Extension of time February 19, 2008, extended to March 20, 2008, by Justice Stevens, application No. 07A628.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment V Just Compensation

U.S. Constitution Amendment VII all matters of property, twenty dollars or more, shall be decided by jury trial

STATEMENT OF THE CASE

This claim is based upon the actions of the Defendants, filing and then holding a forced bench trial for a compensation matter, without Written Release from this citizen, having cited both state and federal law mandates. This claim is not based upon the final decision of the Commonwealth of Kentucky Supreme Court, resting against, which overturned the Kentucky Court of Appeals.

Compensation was based upon a probate settlement price through an appraiser, not qualified for Fair Market Value, in the face of evidence clearly showing an outrageously unjust and arbitrary contradiction over a hundred times the difference. Destroyed or taken agricultural crops were not recognized nor compensated for. Total loss of fair market value was not recognized, due to a main sewer line installation prohibiting future new construction as defined by zoning laws.

Kentucky KRS 416.550-416.670 Eminent Domain law, mandates a jury trial for compensation matters. There is no allowance for total loss of fair market value due to a main sewer line, whereby no new construction can be developed, as in Lucas v. South Carolina Council, 505 U.S. 1003 (1992). Therefore, it is noted that 28 U.S.C. 1403(b) may apply.

This citizen can not rely upon the Defendants, all, to uphold the true essence of rights and law, nor their authority in official capacities to be responsible when cited both state and federal mandates.

REASONS FOR GRANTING THE WRIT

Petitioner relies upon this Highest Court to recognize the injustice of violations of Amendment V and VII in this compensation matter, and find outrageously unjust and outrageously arbitrary the posture of the Respondents, having cited both state and federal mandates .

The Commonwealth of Kentucky Eminent Domain law is not specific enough regarding compensation matters. Allowing a sewer company as a normal utility abuses true essence of that privilege, for a tota! loss of resale value for new construction is taken from the property by a main sewer line installation, just as zoning laws and common sense prohibit. This is sustained by Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and therefore 28 U.S.C. 2403(b) may apply.

Without granting this Writ, citizens in all states may be open to the same violations from a precedence that would be created. The Respondents, in their official capacities, being irresponsible to the true essence of the law and rights of citizens, fail to uphold the law and abuse their authority, putting the burden upon the citizen to buy justice. This same obligation and responsibility should apply in all public matters.

The history of Carpet bagging by the Respondents' corroborations continues in this state with judges turning the cheek to complaints, twisting the law to justify the means of their actions.

CONCLUSION

This citizen honorably served in Viet Nam for the rights and privilege of guaranteed U.S. Constitution rights and property to be upheld and recognized in the true essence of the law. The whole concept of this matter lies upon the Respondents not serving the citizen honorably and responsibly, and not upholding rights and mandates of law.

Just Compensation can not be satisfied by a forced bench trial, without Written Release from the property owner. Main sewer lines take total fair market value for future construction. Commonly used appraisers are not experts for evaluation of fair market property values, when they are restricted by their methods and prone to be user friendly, in the face of real estate agents being the professionals that set fair market value standards. Agricultural crops can not be destroyed or taken without compensation.

The Respondents have no excuse for ignorance of the law in their official capacities and responsibilities, and their violation of a citizen's rights and property can only be construed as pre-meditated continuance of their Carpet bagging history in this state, without your intervention to protect citizens.

Petition for Writ of Certiorari to be granted
Respectfully submitted,
Raymond Bischoff
5215 Bardstown Road
Louisville, Kentucky 40291
(502) 499-1323
May 20, 2008

APPENDIX A

No. 07-5320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

RAYMOND BISCHOFF Plaintiff-Appellant

V.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, JOHN DWYER, DENISE CLAYTON, Judge
Defendants-Appellees

ORDER

Before MERRITT, ROGERS, and MCKEAGUE, Circuit Judges

Raymond Bischoff, proceeding pro se, appeals a district court order dismissing his civil rights action construed as filed under 42 U.S.C. 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

This case arises out of an eminent domain proceeding filed by the Louisville and Jefferson County Metropolitan Sewer District (MSD) to obtain permanent and temporary sewer easements across property owned by Bischoff. After a bench trial in the Jefferson County Circuit Court, a monetary judgment in the amount of $5,522.00 was entered in favor of Bischoff for the taking of his property. Prior to the bench trial, Bischoff belatedly moved for a jury trial, which the trial court denied as

untimely under Ky. R. Civ. P. 38. The issue of whether the trial court's denial of Bischoff's motion for a jury trial violated the Kentucky Constitution was decided in Bischoff's favor on appeal to the Kentucky Court of Appeals. See Bischoff v. Louisville & Jefferson County Metro Sewer Dist., No. 2004-C-002545-MR, 2005 WL3443059 (Ky. Ct. App. Dec. 16, 2005). The case is currently pending in the Kentucky Supreme Court on discretionary review.

Bischoff filed the instant lawsuit against MSD, MSD's counsel in connection with the eminent domain proceeding (John Dwyer), and the Jefferson County Circuit Court Judge who presided over the eminent domain proceedings (Judge Denise Clayton), alleging that the defendants denied "a jury trial for Raymond Bischoff, pro se, property owner, in the face of objection and reference to U.S. Constitution Amendment VII by motion." For relief, Bischoff requests "a jury trial" and "damages and punitive damages for violations of constitutional rights."

Upon motions be the defendants, the district court dismissed the complaint for lack of subject matter jurisdiction and also under the abstention doctrine because an appeal in the condemnation case was still pending. This timely appeal followed.

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997). We also review de novo a district court's decision to abstain. See Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 721 (6th Cir. 1993).

Upon review, we conclude that the district court was correct in abstaining on the basis of the

doctrine announced in Younger v. Harris, 401 U.S. 37 (1971). The Younger doctrine is invoked when state proceedings are pending and principles of federalism dictate that the constitutional claims should be raised and decided in state court without interference of the federal courts. In Middlesex County Ethics Comm. V. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982), the Supreme Court articulated a three –part test for determining whether Younger abstention is appropriate. It held that abstention is appropriate if: 1) state proceedings are ongoing; 2) the state proceedings implicate important state interests; and 3) the state proceedings afford adequate opportunity to raise federal questions. Id.

The three-part test is met in this case. First, Bischoff has an eminent domain case that is apparently still pending in a Kentucky state court. Second, condemnation actions for a Kentucky public body are uniquely a state interest.. Finally, Bischoff has failed to show that the Kentucky courts cannot or will not provide an adequate opportunity to raise his constitutional claim. Indeed, the record reveals that Bischoff has been allowed to raise his constitutional issue in the state proceeding and has raised it in the Jefferson Circuit Court, the Kentucky Court of Appeals, and now the Kentucky Supreme Court, which is empowered to rule on his constitutional issue if it grants discretionary review to do so. Thus, abstention was proper.

Upon further review, we conclude that the district court was correct to dismiss Bischoff's complaint against Judge Clayton. As a state court judge, Judge Clayton is entitled to absolute judicial immunity from liability for damages related to her

judicial acts. Butz v. Economou, 438 U.S. 478, 511-14 (1978); Shelly v. Johnson, 849 F.2d 228, 229-30 (6th Cir. 1988). In addition, insofar as Bischoff seeks monetary damages from Judge Clayton he is barred by the doctrine of Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989). In Will, the Supreme Court held that state officials who are sued in their official capacity for monetary damages are not considered "persons' subject to suit under 1983. It is the plaintiff's affirmative duty to plead the capacity in which he is suing the defendants. See Wells v. Brown, 891 F.2d 591, 593 (6th Cir. 1989). Because Bischoff did not specify the capacity in which he sued Judge Clayton, the complaint is construed as suing this defendant in her official capacity as an employee of the state and Bischoff's claim for monetary damages must fail. See id. At 593-94.

The district court was also correct to dismiss the complaint against the remaining defendants. To state a viable 1983 claim, a plaintiff must allege that: 1) he was deprived of a right, privilege, or immunity secured by the Federal Constitution or laws of the United States, and 2) the deprivation was caused by a person while acting under color of state law. See Flagg Bros. v. Brooks, 436 U.S. 149, 155-57 (1978). Bischoff did not sufficiently allege a deprivation of a federal right because the Seventh Amendment has not been extended to the states and thus does not guarantee a jury trial in state court. See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:06CV-540-H

RAYMOND BISCHOFF PLAINTIFF
v.
LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT, et al.
DEFENDANTS

MEMORANDUM OPINION AND ORDER

This case arises out of an eminent domain proceeding filed by the Metropolitan Sewer District ("MSD") to obtain a permanent and temporary sewer easements across property owned by Plaintiff. After a trial in Judge Clayton's court and the entering of a monetary judgment in Plaintiff's favor for the taking of his property, Plaintiff appealed first to the Kentucky Court of Appeals and has now moved for discretionary review with the Kentucky Supreme Court. All the Defendants have asked that the case be dismissed.

In essence, Plaintiff is asking this federal court to take jurisdiction away from an ongoing proceeding in the Kentucky Supreme Court. This Court knows of no principle of law by which it could undertake to do such a thing in these circumstances. Eminent domain procedures are particularly a feature of state law and are well established. There is no reason the appellate courts of Kentucky cannot adequately consider Plaintiff's due process concerns. Concerns of policy, comity and jurisdiction will

prevent this Court from interfering in such an ongoing state law proceeding. It goes without saying that Judge Clayton retains complete immunity for her actions as a judge. In short, this Court agrees with all of the reasons and arguments set forth in the various motions for summary judgment submitted by Defendants. Plaintiff has not se forth any arguments and reply that suggest a reason for this Court interfering with the ongoing state court proceedings.

Plaintiff has also requested leave to amend his complaint adding various constitutional claims. These are not a lot different than the concerns he has raised already. Once again, Kentucky courts can consider constitutional claims as part of his state appeal. This Court cannot interfere with an ongoing state appeal in these circumstances.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion to amend his complaint is DENIED.

IT IS FURTHER ORDERED that the motions to dismiss of all Defendants are SUSTAINED and this case is DISMISSED WITH PREJUDICE in its entirety.

This is a final and appealable order.

January 26, 2007 John B. Heyburn II
Chief Judge, U.S. District Court

cc: Raymond Bischoff, Pro Se
Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

RAYMOND BISCHOFF, Pro Se
Plaintiff

MSD METROPOLITAN SEWER DISTRICT
JOHNE DWYER, PEDLEY, ZIELKE, GORDINIER
JUDGE DENISE CLAYTON, JEFFERSON CIRCUIT COURT, COMMONWEALTH OF KENTUCKY
Defendants

COMPLAINT

U.S. Constitution Amendment VII guarantees jury trial in all matters of property twenty dollars or more
U.S. Constitution Amendment V guarantees just compensation/fair market value in said matters
Neither was complied with

Plaintiff
Raymond Bischoff
5215 Bardstown Road
Louisville, Ky. 40291
502 499-1323

Defendant
MSD Metropolitan Sever District
700 W. Liberty St
Louisville, Jefferson County, Kentucky 40202

John Dwyer, Pedley, Zielke, Gordinier
2000 Meidinger Tower
462 So. 4th St
Lou, Ky 40202

Commonwealth of Kentucky, Jefferson Circuit Court, Judge Denise Clayton
700 W. Jefferson St.
Lou. Ky 40202

On October 25, 2005, Jefferson County Circuit Court held trial for compensation to a condemnation case, MSD vs. Raymond Bischoff, Judge Denise Clayton presiding. John Dwyer, Zielke, Pedley, and Gordinier, MSD, Jefferson County Circuit Court and Judge Denise Clayton did not provide but deny provision of a jury trial for Raymond Bischoff, Pro Se, property owner, in the face of objection and reference to U.S. Constitution Amendment VII, by motion.

U.S. Constitution Amendment V calling for Just Compensation is moot point at this time, but, appraisers can not give fair market value, probate settlements are improper motive for unjust enrichment by MSD.

There was no written statement to relinquish the right to jury trial.

Prayers for relief:

A. provide a jury trial in order that a fair and unbiased hearing of the facts for just deliberation in this matter
B. Restitution for damages and punitive damages for violations of constitutional rights
C. Admonishment of attornies, Commonwealth of

Kentucky, and courts and judges

D. Clarification of right to condemnation, and provisions thereof, especially just compensation

Request for a jury trial 'yes'

I hereby certify under penalty that the above petition is true to the best of my information, knowledge, and belief.

24 , October, 2006

Raymond Bischoff

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Supreme Court, U.S.
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No. 07-1462

IN THE

Supreme Court of the United States

RAYMOND BISCHOFF,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, ZIELKE, PEDLEY, GORDINIER, DWYER, CLAYTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT AND JOHN H. DWYER, JR.

LAURENCE J. ZIELKE
ZIELKE LAW FIRM
1250 Meidinger Tower
462 South Fourth Street
Louisville, Kentucky 40202
(502) 589-4600

Counsel for Respondents Louisville and Jefferson County Metropolitan Sewer District and John H. Dwyer, Jr.

216520

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Should the well established, long-standing rule that the Seventh Amendment of the U.S. Constitution does not apply in state courts be revisited when a state court litigant was denied a jury trial after failing to properly demand one pursuant to state procedural rules and then collaterally attacked the state court ruling in the United States District Court while the state court action was pending?

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STATEMENT OF THE CASE

This action[1] began in Jefferson County Circuit Court in Louisville, Kentucky, as the compensation phase of an eminent domain proceeding filed by the Respondent Louisville and Jefferson County Metropolitan Sewer District (hereinafter "MSD"), to obtain permanent and temporary sewer easements across property owned by Petitioner Raymond Charles Bischoff. The right to take the easements has been finally established, and the sewer has been installed.

Before the Circuit Court, Petitioner Bischoff made a belated motion for a jury trial. Respondent John H. Dwyer, Jr.[2], acting as attorney for Respondent MSD objected to Petitioner's belated motion. The Circuit Court denied Petitioner's motion and held a bench trial.

The relevant facts concern the timing of filing certain pleadings and motions, including Mr. Bischoff's very belated request for a jury trial. The relevant filings occurred as follows:

- June 11, 2002 — MSD files a verified petition for condemnation against Raymond Charles Bischoff.

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[1] Petitioner has provided the wrong docket number for this case in its Petition; the correct docket number is 07-1462.

[2] Mr. Dwyer is an attorney for the formerly named law firm of Pedley, Zielke, Gordinier and Pence. Petitioner has mistakenly included the law firm as a party to this appeal when it was never named as a party in the underlying state court proceedings.

- August 20, 2002 — Personal service on Raymond Charles Bischoff.
- September 11, 2002 — Mr. Bischoff files what is termed "correspondence" on the court docket sheet. This correspondence objects to MSD's "compensation offer" and to MSD's condemning a sewer easement across his property. This document contains no jury demand.
- September 16, 2002 — MSD moves for a hearing on its right to condemn an easement across Mr. Bischoff's property.
- December 30, 2002 — MSD files a Statement of Exceptions in which it contests the amount of the commissioners' award.
- January 14, 2003 — Mr. Bischoff files a document either objecting to or moving to strike MSD's Statement of Exceptions. This document contains no jury demand.
- January 14, 2003 — Bischoff files his own exceptions to the

commissioners' award. This document contains no jury demand.

- January 30, 2003 — The trial court enters an interlocutory judgment condemning the permanent and temporary easements across Mr. Bischoff's property.
- Januai y 30, 3002 — Mr. Bischoff files a motion to set aside the trial court's Interlocutory Judgment.
- April 4, 2003 — The trial court enters an order denying Mr. Bischoff's motion to set aside the Interlocutory Judgment.
- August 7, 2003 — Mr. Bischoff files a written request for a jury trial. There is no indication that Mr. Bischoff tendered the required fee for a jury trial.
- August 18, 2003 — Mr. Bischoff makes an oral motion for a jury trial.
- September 5, 2003 — The trial court enters an order denying Mr. Bischoff's motion for a jury trial.

Pursuant to Kentucky Civil Rule 38.02, a jury demand must be served within 10 days of the last pleading directed to the issue. In eminent domain actions, the last pleading directed to the issue of compensation is the statement of exceptions, which must be filed within thirty days of the entry of the interlocutory judgment. Kentucky Revised Statute 416.620(6). Petitioner Bischoff failed to meet this deadline.

In denying Mr. Bischoff's motion for a jury trial, the Circuit Court stated:

> By Motion heard on August 18, 2003, the respondent made a request for a jury trial by jury. A hearing on the issue of the property value and compensation to the respondent was scheduled for August 26, 2003. The petitioner objects to this request for a jury trial stating that request was not made timely. The Court finds that pursuant to Civil Rule 38, the respondent's request for a jury trial is not timely. Further, pursuant to Civil Rule 38.04, the basis for the respondent to request a jury trial was not the result of excusable neglect discussed in Civil Rule 6.02.

TR 109.

A bench trial on valuation was ultimately held on October 25, 2004. At trial, MSD presented testimony from licensed real estate appraiser Sharon Hall that the difference in the value of the property before and after the taking, along with the value of a temporary work

easement, was at most $5,522. 30-5-04-VCR-062 at 15:23:10-35.

Mr. Bischoff's proffered testimony on valuation was limited to the testimony of Reba McIntyre, a local realtor. Ms. McIntyre testified that Mr. Bischoff had received an offer of $3,000,000 for the property. Ms. McIntyre admitted that this offer was based on the existence of the sewer being constructed by this project, and that she had no opinion of the value of the property prior to the addition of the sewer. TR 135-37 *Final Order*. In fact, Ms. McIntyre conceded that Mr. Bischoff's property would be worth MORE after the taking, *i.e.*, after the sewers were installed. 30-5-04-VCR-062 at 16:20:07-40. Mr. Bischoff never offered any proof that the subject property had a higher value before the taking. *Final Order*, TR 135-37.

Based on this proof, the trial court entered its final judgment on November 4, 2004, awarding Mr. Bischoff $5,522, the precise amount proposed by MSD. *Id.* The judgment also notes that Mr. Bischoff failed to offer any proof of diminution of value at the trial. *Id.* Mr. Bischoff appealed and filed a parallel action in the United States District Court for the Western District of Kentucky.

The United States District Court for the Western District of Kentucky dismissed Petitioner Bischoff's claims abstaining based on the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The United States Court of Appeals for the Sixth Circuit upheld the decision of the United States District Court.

REASONS FOR DENYING THE PETITION

The facts of this case do not merit review as they do not present any unique question or point of law that should be revisited. The case of *Younger v. Harris*, 401 U.S. 37, 49-53 (1971), requires that a federal court abstain from ruling on a case if the same issues are litigated in a state court proceeding where all defenses may be raised. Mr. Bischoff was properly in state court where he raised each argument currently before this Court. Further, the Seventh Amendment to the U.S. Constitution is not binding on the states. Finally, Bischoff waived his right to appeal the District Court's dismissal of his claims because he never filed an objection or response to Respondents' motions to dismiss.

I. Seventh Amendment Does Not Apply.

Petitioner's sole claim is for a violation of a Seventh Amendment right to a jury trial in state court. But the Seventh Amendment is not applicable to the states through the Fourteenth Amendment. *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876); *accord Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 432 (U.S. 1996) (explaining that the Seventh Amendment "governs proceedings in federal court but not in state court".). This Court, Federal courts and numerous state courts have been consistent in determining that the Seventh Amendment is not applicable to the states. *See generally e.g. Chesapeake & O. R. Co. v. Kelly's Adm'x*, 161 Ky. 655, 659 (Ky. 1914); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (Ca. 2005); *Artway v. Scheidemantel*, 671 F.Supp. 330 (D. N.J. 1987); *Dohany v. Rogers, State*

Highway Commissioner of Michigan, et al., 281 U.S. 362, 50 S.Ct. 299 (1930); *Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La. 1972); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991); *Wagner Electric Mfg. Co. v. Lyndon*, 43 S.Ct. 589, 262 U.S. 226 (1923); *Beauclaire v. Greenhouse*, 922 So.2d 501 (La. 2006); *Chisolm v. TranSouth Financial Corp.*, 194 F.R.D. 538 (E.D.Va., 2000); *O'Connor v. State of Nev.*, 507 F.Supp. 546 (D.C.Nev.1981), *affirmed* 686 F.2d 749, certiorari denied 103 S.Ct. 491, 459 U.S. 1071; *Iacaponi v. New Amsterdam Cas. Co.*, 258 F.Supp. 880 (W.D. Pa. 1966), *affirmed* 379 F.2d 311, certiorari denied 88 S.Ct. 802, 389 U.S. 1054.

Respondent Judge Clayton's denial of Petitioner's motion for a jury trial, therefore, did not implicate his rights under the Seventh Amendment. Thus, his complaint does not allege a claim arising under the U.S. Constitution. For the same reason the complaint does not allege a claim arising under the laws of the United States.

The only federal law seemingly implicated here is 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Because Judge Clayton's denial of Petitioner's motion for a jury trial did not deprive him of any federal right, privilege, or immunity, the complaint did not state a claim under 42 U.S.C. § 1983. Therefore, the District Court did not have jurisdiction over this case under 28 U.S.C. § 1331 or 28 U.S.C. § 1343.

Assuming for the sake of argument only that the District Court found a valid cause of action for violation of Petitioner's Seventh Amendment right to a jury trial, there was no allegation that either Respondent MSD or Dwyer had a duty to Petitioner. Therefore, their dismissal was valid.

Petitioner moved for a jury trial. Respondent MSD through counsel objected to the motion as being untimely. Judge Clayton consequently denied Petitioner's motion. Neither Respondent MSD nor Dwyer owed Petitioner a duty under these circumstances. With no duty, there was no viable cause of action against either MSD or Mr. Dwyer. *See e.g., Doe v. Claiborne County*, 103 F.3d 495, 511 (6th Cir. 1996) (holding that "for constitutional tort liability on the basis of inaction must derive from some identifiable source of duty").

II. Younger Abstention Is Proper.

In its Memorandum and Order dated March 15, 2007, the District Court correctly cited the abstention doctrine established in *Younger v. Harris*, 401 U.S. 37, 49-53 (1971), as another basis for its order dismissing Petitioner's claims. *Younger* formalized a long-standing national policy forbidding federal courts to interfere with

state court proceedings. It is applicable here as Petitioner wished to have an ongoing state court action stopped in mid-stream and transferred to the federal court system. It cannot be done. *Younger* involved an on-going state criminal proceeding; however, the abstention doctrine has been expanded to cover civil proceedings such as the one before this Court in this case. *See, e.g., Huffman v. Pursue*, 420 U.S. 592 (1975).

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Supreme Court set out a three part test for determining when the abstention doctrine should be applied. That test is met here. As described by the Sixth Circuit, the test is as follows:

> *Younger* abstention in civil cases requires the satisfaction of three elements. Federal courts should abstain when (1) state proceedings are pending; (2) the state proceedings involve an important state interest; and (3) the state proceedings will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Hayse v. Wethington*, 11 F.3d 18, 20 (6th Cir. 1997).

As set forth in the Statement of Facts, state proceedings were pending at the time Petitioner filed the U.S. District Court action in this case. Petitioner appealed the decision of the Jefferson Circuit Court to the Kentucky Court of Appeals where Petitioner prevailed. The Court of Appeals opinion was the subject of a motion for discretionary review at the Kentucky Supreme Court, which reversed the Court of Appeals.

The final state court action occurred in April of 2008, long after this action was filed. Thus the first element of the *Younger* abstention test is met.

Second, the state proceedings must involve important state interest. In this case, the state proceedings must determine whether a litigant in a state court condemnation action may waive his or her right to a jury trial by failing to ask for one by a date certain in a court scheduling order. This is an interest only to the state. Condemnation actions for a Kentucky public body corporate is uniquely a state interest. Whether to grant or not grant jury trials in state court is uniquely a state interest. Whether to allow state court judges to enforce state court scheduling orders is uniquely a state interest. The second element is thus met.

The third element asks whether the state proceedings will allow the litigant to raise constitutional issues. This element is also met. The Petitioner has been allowed to raise his constitutional issues in the state proceeding and has raised them in the Jefferson Circuit Court, the Kentucky Court of Appeals and now in the Kentucky Supreme Court which is empowered to rule on his constitutional issues if it grants discretionary review to do so.

III. The District Court and Sixth Circuit Lacked Jurisdiction Over This Claim.

Jurisdiction has not been proper in this case and subsequently violates 28 U.S.C. § 1257. Petitioner asked the United States District Court to exercise jurisdiction over a state court judgment. After the District Court

dismissed the suit, Petitioner appealed to the United States Court of Appeals to exercise jurisdiction over a state court judgment. Now, Petitioner is asking for a grant of certiorari from the United States Court of Appeals, not from the Kentucky Supreme Court. Thereby violating 28 U.S.C. § 1257.

The grant of federal jurisdiction over state court judgments is exclusive to the United States Supreme Court under 28 U.S.C. § 1257 and cannot begin with a complaint in a United States District Court followed by an appeal to a United States Court of Appeal. *Lance, et al, v. Gigi Dennis* 546 U.S. 459 (2006) *on remand* 2007 U.S. Dist. LEXIS 20965 (D. Colo. Mar. 23, 2007). *See also, District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed. 2d 206 (1983). "Accordingly, under what has come to be known as the *Rooker-Feldman* doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Gigi Dennis* at 1201. As this Court has stated, the *Rooker-Feldman* doctrine is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon v. Saudi Basic Indust. Corp.*, 544 U.S. 280, 284 (2005). Petitioner lost on its issues presented in the Kentucky state courts and then proceeded to file in Federal court to appeal the state court decision. This is impermissible under 28 U.S.C. § 1257.

IV. 28 U.S.C. § 2403 (b) is not applicable to this case.

Petitioner has stated that 28 U.S.C. § 2403 (b) "may apply" because as

> "[p]etitioner contends that, Kentucky KRS 416.550 to 416.670 mandates requiring a jury trial were violated [*sic*] by all Respondents. Also, the statues [*sic*] do not allow for just compensation in consideration of a main sewer line, noting that new construction on the easement property is totally eliminated for future use, not the normal utility easement consideration.

Petition, p. 3.

28 U.S.C. § 2403 (b) provides:

> In any action, suit, or proceeding in a court of the United States to which a **State or any agency, officer, or employee thereof is not a party**, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a

> proper presentation of the facts and law relating to the question of constitutionality. (emphasis added).

In this action, Petitioner has named Judge Denise Clayton[3] as a party[4] and she is an employee of the state. Moreover, this Court held that state officials who are sued in their official capacity for monetary damages are not considered "persons" subject to suit under 42 U.S.C. § 1983. *Will v. Mich. Dep't. of State Police*, 491 U.S. 58, 70-71 n. 10 (1989). Thus, 28 U.S.C. § 2403 (b) is not applicable.

Furthermore, Petitioner contends that "Kentucky KRS 416.550 to 416.670 mandates requiring a jury trial were violated by all Respondents." Kentucky Revised Statutes § 416.550-416.670 make no mention, express or implied, that Petitioner is entitled to a jury trial for property valuation in a condemnation proceeding. In fact, KRS § 416.570 states:

> Except as otherwise provided in KRS 416.560, a condemnor seeking to condemn property or the use and occupation thereof, shall file a verified petition in the Circuit Court of the county in which all or the greater

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[3] Judge Clayton's involvement with this case arises during her time serving on the bench for the Commonwealth of Kentucky Jefferson County Circuit Court.

[4] Petitioner has also named the Commonwealth of Kentucky as a party to this appeal, however, the Commonwealth of Kentucky was not a named party in the underlying Federal cases.

> portion of the property sought to be condemned is located, which petition shall state that it is filed under the provisions of KRS 416.550 to 416.670 and shall contain, in substance:
>
> (1) Allegations sufficient to show that the petitioner is entitled, under the provisions of applicable law, to exercise the right of eminent domain and to condemn the property, or the use and occupation thereof, sought to be taken in such proceedings;
>
> (2) A particular description of the property and the use and occupation thereof sought to be condemned; and
>
> (3) **An application to the court to appoint commissioners to award the amount of compensation the owner of the property sought to be condemned is entitled to receive therefor.**

KRS § 416.570 (emphasis added). This statute clearly demonstrates that property valuations for the amount of "just compensation" are determined through an appointment of commissioners and not a jury trial. Even if KRS § 416.570 was not sufficient to show that jury trials are not granted to determine the amount of compensation, KRS § 416.580 provides in even greater detail:

> (1) The Circuit Court, or in the absence of the Circuit Judge from the county, the Circuit

Court Clerk, **shall appoint as commissioners three (3) impartial housekeepers of the county who are owners of land.** They shall be sworn to faithfully and impartially discharge their duties under this section. **The commissioners shall view the land or material sought to be condemned and award to the owner or owners such a sum as will fairly represent the reduction in the market value of the entire property,** all of or a portion of which is sought to be condemned, said sum being the difference between the market value of the entire property immediately before the taking and the market value of the remainder of the property immediately after the taking thereof, together with the fair rental value of any temporary easements sought to be condemned. Within fifteen (15) days from the date of their appointment, they shall return a written report to the office of the Circuit Court, stating the above values in their award and shall describe in their report the property sought to be condemned. They shall be allowed a reasonable fee which shall be taxed as costs.

(2) In the event any person appointed to serve as commissioner fails, refuses or becomes incapable of acting, the court, or judge thereof, shall forthwith appoint a qualified person to fill the vacancy. A majority of the commissioners appointed and qualified have the power to act and to make and sign

> the award and report. **If a majority of the commissioners do not agree on a decision, three (3) new commissioners shall be appointed by the court on application by any of the parties to the action.**

KRS § 416.580 (emphasis added). Instead of a jury trial to determine the value of the property, three (3) commissioners are appointed. And even if those commissions cannot agree on a decision no jury trial is granted- three more commissioners are appointed to value the property. After the property's value has been determined by the commissioners an interlocutory judgment is entered. KRS § 416.610 (2).

The interlocutory judgment was entered January 30, 2003. Petitioner then had thirty (30) days from the date of entry of the interlocutory judgment to file a statement of exceptions. KRS § 416.620 (1). Petitioner could have questioned the amount of compensation at this time and been granted a jury trial; "[a]ll questions of fact pertaining to the amount of compensation to the owner, or owners, shall be determined by a jury, which jury on the motion of either party shall be sent by the court, in the charge of the sheriff, to view the land and material." KRS § 416.620 (1). However, Petitioner failed to make a timely statement of exceptions in response to the interlocutory judgment. Bischoff did not file his demand for a jury trial until August 7, 2003, almost three months past the last pleading directed to the issue of compensation and eleven months after Bischoff filed his first pleading in this case. Thus, Petitioner waived his right to a jury trial by not following applicable procedural rules in a timely fashion.

Failure to abide by filing deadlines that limit one's rights to a jury trial do not abridge Seventh Amendment rights because that person still had access to a jury trial. *See Beauclaire v. Greenhouse* 922 So.2d 501 (La. 2006); *Moore v. U.S.*, 196 F.2d 906 (5th Cir. 1952); *Maytag Co. v. Meadows Mfg. Co.*, 45 F.2d 299 (7th Cir. 1930), *certiorari denied*, 51 S.Ct. 489, 283 U.S. 843; *Montanez-Baez v. Puerto Rico Ports Authority*, 509 F.Supp.2d 152 (D. Puerto Rico 2007); *People v. Ramos*, 101 P.3d 478 (Ca. 2004); *Sperandeo v. Denny's, Inc.*, 683 So.2d 743 (5th Cir. 1996).

CONCLUSION

The legal issues presented in this case are clearly established and need not be revisited by this Honorable Court. For the foregoing reasons, Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

LAURENCE J. ZIELKE
ZIELKE LAW FIRM
1250 Meidinger Tower
462 South Fourth Street
Louisville, Kentucky 40202
(502) 589-4600

Counsel for Respondents
Louisville and Jefferson County
Metropolitan Sewer District
and John H. Dwyer, Jr.

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(3)

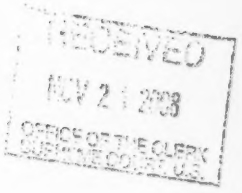
NO. 07-1462

SUPREME COURT of the UNITED STATES

Raymond Bischoff — Petitioner

v.

Commonwealth of Kentucky,
Louisville and Jefferson County Sewer District,
Zielke, Pedley, Gordinier, Dwyer, Judge Clayton — Respondents



CERTIFICATION

Petitioner states that the grounds for Petition for Rehearing are limited to intervening circumstances of substantial or controlling effect or other grounds not previously presented.

Petitioner states that the Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

Raymond Bischoff
Pro Se
5215 Bardstown Road
Louisville, Kentucky 40291
(502) 499-1323